Supreme Court U.S.
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No. 01-1301

IN THE

Supreme Court of the United States

GEORGE H. SEYMOUR,

Petitioner,

v.

W. ANDREW REESE, M.D., individually and in his capacity as Medical Director of the Pamunkey Regional Jail,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Is there a division among the Circuit Courts about what constitutes deliberate indifference to a serious medical need?

II. Did the United States Court of Appeals for the Fourth Circuit reversibly err in affirming the district court's grant of summary judgment in favor of Dr. Reese on the grounds that Dr. Reese was not deliberately indifferent to Petitioner's serious medical need?

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STATEMENT OF THE CASE

This case involves medical treatment received by Petitioner George Seymour ("Petitioner" or "Seymour") from members of the medical staff at the Pamunkey Regional Jail ("the jail") while he was a pretrial detainee. In his Complaint, Seymour alleged that W. Andrew Reese, M.D. ("Dr. Reese") was deliberately indifferent to his serious medical needs while Seymour was detained. Seymour did not sue any of the other medical providers involved in his care.

The District Court granted summary judgment to Dr. Reese finding that no genuine issue of material fact existed as to Petitioner's claim and that, based upon those facts, Dr. Reese was not deliberately indifferent to Seymour's serious medical needs. The Fourth Circuit Court of Appeals affirmed the District Court's decision.

I. Clarification Of The Record

The underpinnings of Seymour's claim are that he was on MS Contin[1] when he arrived at the jail, that he had been on it for an extended period of time and that he provided documentation of this to the medical staff during the early days of his detention. Petitioner's Statement of the Facts is riddled with material misstatements with regard to these facts.

Petitioner suggests that he did not appear for his hearing — necessitating the issuance of the capias which resulted in his detention — because he was hospitalized on October 20, 1998. However, the medical records from Bon Secours Memorial Regional Medical Center indicate that he was admitted on October 19, 1998 and discharged the same day.

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1. MS Contin is the prescription name for synthetic morphine.

(Jt. App. p. 63-64) Further, while Seymour claims he brought his Bon Secours records to the jail with him, and that Dr. Reese was deliberately indifferent for not reviewing them, Seymour presented no evidence that the jail medical staff received any medical records from the October 19, 1998 Emergency Room admission.

The October 19, 1998 Rescue Squad records show that Seymour told the Rescue Squad that he was taking the following medications: Carb/Levo, Trazadone, Endocet, Prozac, and Glucosamine. (Jt. App. p. 65) Seymour did not report that he was taking morphine at that time. Upon arrival at Bon Secours, Seymour reported the same information to the nurse. Again, no report of morphine. (Jt. App. p. 67)

While at Bon Secours, the ER physician treated Seymour for leg pain and numbness and discharged him the same day at 3:35 p.m. The doctor gave Seymour a prescription for MS-Contin 30 mg. to be taken three times per day. (Jt. App. pp. 70-71) Contrary to Petitioner's statement, the evidence showed that he had not been on morphine for more than one day before his detention at the jail.

Within hours of his incarceration, the nursing staff contacted Peter Ober, Dr. Reese's physician assistant, regarding Seymour's medication[2]. (Jt. App. p. 123) Ober reviewed the list of medications and advised that these medications were not needed as soon as possible. (Jt. App. p. 27) Instead, Ober asked the nursing staff to verify the patient's medication with his treating physicians. Quite, appropriately, Ober did not want to order the medication without either verification or formal prescriptions with a physician's signature. (Jt. App. p. 29)

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2. At the time of his detention, Seymour gave the jail staff a list of medications he was supposedly taking.

Petitioner claims that the medical staff, including Dr. Reese, unreasonably failed to heed the instructions of Petitioner's treating physicians. However, Petitioner neglected to include in his statement of facts that the nursing staff at the jail called each of Petitioner's physicians to verify the medication prescribed by each of them to the Petitioner. The information Petitioner relates about Dr. Jeffrey Wilson is typical of the Petitioner's misstatements of fact. Petitioner claims that Dr. Reese should have prescribed morphine based upon the information Dr. Wilson's staff provided. Significantly, the record establishes that Dr. Wilson's office returned the jail nursing staff's call and advised that Seymour was being worked up for a left hip replacement planned within the next month. Dr. Wilson's office further advised that inmate [Seymour] has been on MS Contin for several months *"however is prescribed by another physician. Dr. J. Hawkins is controlling his pain management."* (Jt. App. p. 124, emphasis added) By his own report, Dr. Wilson did not and had not prescribed morphine to Seymour, did not provide the jail staff with dosage information and was not the treating physician for purposes of Seymour's pain management.

The nursing staff made many calls in an attempt to provide Seymour with the proper medication at the proper dosage. First, the nursing staff called Hanover Mental Health to verify Seymour's medication. The doctor confirmed that Seymour was to receive Prozac; the Trazadone which Seymour claimed he should be given and which was on his list had been discontinued. (Jt. App. p. 123) The nursing staff also called another physician — Dr. Brodeur — and confirmed the prescription for Quinine Sulfate and Clonazapam. These medications were then ordered from the pharmacy who supplied the jail. (*Id.*) The staff also called Dr. Wilson as discussed above. Based upon the report from

Dr. Wilson, the staff then called Dr. Hawkins to obtain medication and dosage verification on the morphine. A message was left but no return call was received. The nursing staff called again on October 22, 1998 and left a second message. No return call was received. (Jt. App. p. 123-124)

The nursing staff contacted Ober on October 21, 1998, at 3:30 p.m. to advise that Seymour was complaining of pain. Accordingly, Ober ordered *prescription strength* Motrin 800 mg three times per day. (Jt. App. p. 123) Petitioner incorrectly states that he was given an over-the-counter pain reliever.

Seymour also seeks to minimize Dr. Reese's efforts at his first visit with Seymour. The note from the October 23, 1998 visit reflects that Dr. Reese took a history from Seymour, conducted a physical examination, and observed Seymour moving around — all of this in response to Seymour's complaints of leg pain. Dr. Reese concluded that Seymour was mildly tender and did not appear to be in pain. He recommended continuing the current prescription medication - Motrin 800 mg. He also specifically stated that he needed the records from [Dr.] Hawkins. (Jt. App. p. 132) Based upon this examination, Dr. Reese did not believe Seymour needed to be on morphine. (Jt. App. pp. 20, 132)

Petitioner's recitation of the facts with regard to this exam and the prescriptions is quite simply wrong. He states "[t]he prescription given by respondent to continue the Motrin 800 went against the prescription of Petitioner's physician which had already been confirmed by Dr. Wilson and included in the nursing staff's notes, that Petitioner be given MS Contin." (Pet. Br. p. 4) First, Dr. Wilson did not indicate that Petitioner should be given MS Contin — only that he had been on it. Second, he stated that Dr. Hawkins

was the physician addressing Seymour's pain management needs. As of October 23, 1998, Dr. Hawkins had not returned the phone calls to verify either the medication or the dosage — hence the need expressed by Dr. Reese to get Dr. Hawkins' records.

Part of Petitioner's claim against Dr. Reese is that he suffered from withdrawal as a result of Dr. Reese's failure to prescribe morphine. He suggests that as of October 26, 1998 he was suffering the symptoms of withdrawal. However, there is no such evidence in the medical records. Further, as of the date of his detention, the evidence establishes that Petitioner had been on MS Contin for *only one day*. Petitioner presented no evidence that removal of MS Contin after one day would lead to withdrawal symptoms.

Petitioner makes much ado about the letter Dr. Hawkins wrote at the request of Petitioner's friend. Petitioner states that the letter was delivered to the jail on October 26, 1998, yet the letter is dated October 27, 1998. Further, there is not one shred of evidence that it was ever received by the jail. Petitioner's friend did not provide an affidavit to that affect and the medical records do not contain the letter. Finally, Dr. Reese denies ever seeing the letter. Even if he had seen the letter, it states that Seymour was not on MS Contin at the time he was detained at the jail. Instead, Dr. Hawkins states that she prescribed Percocet on October 16, 1998, just four days before his detention.

With regard to the evaluation on October 30, 1998, Petitioner again misstates the facts as they exist in the record. On that date, Dr. Reese had the benefit of Seymour's prior medical records, which confirmed the prescription for MS Contin. (Jt. App. pp. 49-114) Dr. Reese did not reverse

course but merely reacted to the additional information obtained at his request. Further, while Dr. Reese did indeed ask Seymour about the dosage of MS Contin, he did not give Seymour any MS Contin until he verified the dosage with the pharmacy who filled the prescription. Note that the dosage given is the exact amount prescribed by the Emergency Room physician at Bon Secours on October 19, 1998. (Jt. App. p. 71)

Petitioner suggests that after beginning to receive the MS Contin he suffered from hallucinations. There is no documentation, however, of any such condition at any time during Seymour's detention. On November 2, 1998 at 1:30 p.m., the nursing staff verified with Seymour's pharmacist that he had been prescribed MS Contin 30 mg every eight hours. (Jt. App. p. 38) The nursing staff started the MS Contin on November 3, 1998. (Jt. App. p. 139) At the same time, Seymour was moved to the medical unit for direct observation by the nurses and to ensure immediate availability of medical care to assist him if he had any problems. (Jt. App. pp. 69, 126) Seymour remained in the medical unit until he was bonded out on November 18, 1998. (Jt. App. pp. 131, 137) While in the medical unit, Seymour functioned normally, had no significant evidence of pain and showed no distress. Neither did he show any episodes of adverse effects of the pain medication. (Jt. App. pp. 41, 126, 127-129 and 130-131)

Seymour relies heavily on Dr. Hawkins' Affidavit to support his argument that a jury issue existed as to deliberate indifference. (Pet. Br. pp. 5-6) However, Dr. Hawkins' Affidavit is suspect for a number of reasons. First, she complains that Dr. Reese did not prescribe MS Contin yet did not have the professional courtesy to respond to phone calls requesting verification of the prescription. Second, she

suggests that Seymour may have suffered withdrawal because of the length of time he had been on MS Contin, yet her own October 27, 1998 letter attached to the Affidavit indicates that she was not prescribing MS Contin for Seymour at the time of his detention. Third, while the dosage prescribed by Dr. Reese exceeded what Dr. Hawkins may have chosen to prescribe, it was the exact amount prescribed by the Emergency Room physician. Finally, Dr. Hawkins is quick to opine that Dr. Reese was deliberately indifferent, yet deliberate indifference requires an understanding of the subjective knowledge of Dr. Reese. Dr. Hawkins, however, was not provided with any information regarding the information available to Dr. Reese during Seymour's detention.

REASONS FOR DENYING THE WRIT

I. Seymour Has Not Articulated A Compelling Reason To Justify A Discretionary Review By This Court

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Petitioner argues that a compelling reason exists because there is a conflict among the Circuit Courts on the standard applicable to these types of cases. However, the only two cases he cites, *Steele v. Shah*, 87 F.3d 1266 (11th Cir. 1996)[3] and *Hudson v. McHugh*, 148 F.3d 859 (7th Cir. 1998), do not depart from well-settled principles established by this court and other circuits regarding the standard applicable to claims of deprivation of constitutional rights as a result of medical care or the lack thereof.

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3. The decision as cited was amended by opinion dated September 5, 1996. The amended opinion can be found at 1996 U.S. App. LEXIS 23301.

In *Steele* and *Hudson*, the Circuit courts applied the well-established "deliberate indifference" standard and found that the facts of those cases did not justify a ruling in the defendant's favor on summary judgment. Key to the courts' decisions was the undisputed evidence that the defendants had actual knowledge of the inmates' serious medical need and, armed with that knowledge, did nothing about it. These decisions do not support the conclusion that there is a split in the Circuits on the applicable substantive law.

In fact, the language of those decisions tracks both the decisions of this court and of the Fourth Circuit Court of Appeals. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Young v. City of Mt. Ranier*, 238 F.3d 567 (4th Cir. 2001). Indeed, it is identical to the analysis of the District Court and Fourth Circuit in this case. (Pet. Br. 1a-11a)

Seymour has not provided this court with any compelling reasons for this Court to exercise discretionary jurisdiction over his appeal of the grant of summary judgment to Dr. Reese and the petition should therefore be denied.

II. The Lower Courts Did Not Err In Deciding This Case

Dr. Reese provided Seymour medical care which included a conscientious and deliberate course of examinations, verification of prescriptions and provision of necessary medical treatment, all done in a timely fashion. There is no evidence that Dr. Reese was deliberately indifferent to Seymour's need for pain medication and thus violated Seymour's Fourteenth Amendment rights. The District Court and Fourth Circuit correctly granted summary judgment in Dr. Reese's favor.

Only governmental conduct that "shocks the conscience" is actionable as a violation of the Fourteenth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998); *Young v. City of Mt. Ranier*, 238 F.3d 567 (4th Cir. 2001). Accordingly, in a case such as this one, where a plaintiff asserts a claim for failure to provide medical care, a state actor's conduct that amounts to "deliberate indifference" of the plaintiff's serious medical needs is viewed as sufficiently shocking to the conscience to support a Fourteenth Amendment claim. *Young*, 238 F.3d at 574-575.

Deliberate indifference requires a showing that the defendant actually knew of and disregarded a substantial risk of serious injury to the detainee *or that they actually knew of and ignored a detainee's serious need for medical care. Id.*, at 575; *See White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) ("A claim of deliberate indifference . . . implies at a minimum that defendants were plainly on notice of a danger and chose to ignore the danger notwithstanding the notice."); *see also Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (A prison official cannot be found liable . . . for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to an inmate's health or safety.) Thus, in order to establish a claim of deliberate indifference to a medical need, the need must be both apparent and serious, and the denial of attention must be both deliberate and without legitimate penological objective. *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999).

Even a cursory review of the Statement of Facts reveals that there was no denial of attention, no knowledge of a substantial risk of injury and no effort to ignore a serious need for medical care.

Seymour argues that Dr. Reese's deliberate indifference arises from three separate acts: first, his failure to follow treatment notes contained in the medical records; second, that Dr. Reese should not have substituted his own judgment for that of Seymour's treating physicians; and third, that Dr. Reese resumed the morphine at three times the level prescribed by Dr. Hawkins. In support, Seymour offers his own Affidavit, selected medical records from Seymour's stay at the jail, and a letter and affidavit from Dr. Hawkins for support. Yet, as discussed above, none of these items of evidence supports Seymour's claim that Dr. Reese's medical treatment was "so grossly incompetent, inadequate or excessive so as to shock the conscience or to be intolerable to fundamental fairness." *Miltier v. Beorn*, 896 F.2d 848 (4th Cir. 1990).

Deliberate indifference is a very high standard and a showing of mere negligence will not satisfy this standard. *Grayson*, 195 F.3d at 695; *Young*, 238 F.3d at 575. Seymour failed to prove that Dr. Reese *actually knew of and ignored* his *serious need for medical care. Young*, 238 F.3d at 575. The record fails to establish a genuine issue of material fact in this regard. Instead, as evidenced by the medical records and supporting affidavits, and even Seymour's Affidavit, Dr. Reese was responsive to Seymour's complaints, saw him on each occasion that he was requested to do so, prescribed medication as indicated, requested necessary information from Seymour's physicians, and arranged for Seymour to be admitted to the medical unit for close observation.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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